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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [illegible] 77

LOUIS E. WOLCHER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF [illegible] THE NINTH CIRCUIT

[illegible]

[illegible]

[illegible]

Of Counsel:

Leo E. Fleming

[illegible]

San Francisco, California

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 28, 1954.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 218 F. 2d 505, and is printed in Appendix A.

The opinion of the Court of Appeals in an earlier phase, reversing a conviction on the same indictment and remanding for a new trial, is reported in 200 F. 2d 493, and is printed in Appendix B.

No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1954, R. 511. Rehearing was denied

on March 16, 1955, R. 513. An order dated April 9, 1955, signed by Mr. Justice Douglas, extended the time for filing petition for a writ of certiorari to and including May 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

On a trial for income tax evasion, the Government proved and petitioner Wolcher admits that in 1943 he received prices over legal ceilings for whisky. His defense is that he had to pay over-ceiling prices on his purchases and realized no net income on the transaction.

The critical testimony is Wolcher's statements that he paid for the whisky by ceiling payments to the shipper, and by over-ceiling payments to one Gersh, his contact in arranging the purchases. He testified that in addition to certain payments made to Gersh by check he sent large sums of cash to Gersh, by mail and express, without receipts or records.

At a previous trial the Government presented Gersh as a rebuttal witness. Gersh admitted receipt from Wolcher not only of some moneys paid by check but also of certain large sums sent by Wolcher to Gersh in cash. These cash receipts were identified as deposits on Gersh's Corn Exchange Bank bank records (i.e. the bank records of the "Cash Box", a trade magazine published by Gersh). These bank records were introduced as exhibits by the Government and also made available to the defense for exhibits.

Gersh contended he had been given the cash money to purchase pinball machines and phonographs, that pinball machines could not be acquired unless the purchaser was armed with the full cash payment in advance; that he had been unable to make purchases as requested and had therefore promptly returned to Wolcher in cash each of the shipments of cash funds which had been received from Wolcher, except in the last instance when he had been able to purchase ten phonographs for Wolcher. The trial court

excluded Wolcher's rebuttal documentary evidence showing that pinball machines were not then in short supply requiring cash payment in advance of shipment, and that Gersh had not in fact arranged the purchase of the phonographs. The Court of Appeals reversed and remanded, in part because of the actions of the trial court in excluding that documentary evidence. *Wolcher* v. *United States*, 200 F. 2d 493, Appendix B.

On the second trial, the Government subpenaed Gersh, but released him, without notice to petitioner, before defense completed its case. The prosecuting attorney frustrated the efforts of defense counsel to identify and introduce Gersh's bank statements which had been exhibits at the previous trial. The prosecuting attorney urged that there was no materiality in the records of a stranger to the trial. The Treasury Agent in charge of the investigation, who had attended the first trial, professed he had not seen these bank statements in the course of either the investigation or the first trial, and the prosecuting attorney professed that he had no knowledge of these exhibits or of any part of the first trial. That these statements were lacking in candor is shown below.

Defense counsel was thus unable to identify the corroboratory bank statements and perforce rested his case. The Government rested its case forthwith, although it had previously stated it would have rebuttal. A short recess from 10:30 a.m. to 1 p.m. was called to enable counsel to prepare argument to the jury. As the first order of business after resting of the case, defense counsel advised the trial court that he had just learned that Gersh was actually in San Francisco. The prosecuting attorney stated that Gersh had been notified that he was not to appear but that nonetheless he was in town. Defense counsel asked that the case be reopened to provide an opportunity to produce Gersh and thus identify the Gersh bank records. This was denied on the ground that the application was not timely, and that defense counsel could have subpenaed Gersh before. Defense counsel stated that he had not

anticipated the prosecution's tactics circumventing indentification of the bank records.

The prosecuting attorney presented the case to the jury on the ground that petitioner's story of shipments of large sums of cash to Gersh was unsupported and fabricated. This was done notwithstanding the fact that Wolcher's testimony in this respect had been corroborated at the first trial not only by Gersh's oral testimony but by the documentary bank records.

In the light of the foregoing facts and tactics, and viewing the following questions both singly and cumulatively, the questions presented are:

1. Was there grievous misconduct on the part of the prosecution, and a failure to comply with the Government's obligations in regard to evidence in its control corroborating the accused taxpayer in a vital respect,—

(a) In the prosecuting attorney's presentation to the jury on the ground that petitioner's testimony of cash shipments to Gersh was unsupported and fabricated when that fact had been established at the first trial by Government witness Gersh and his bank records.

(b) In frustrating defense counsel's efforts to identify the corroborating bank records, by the foregoing testimony by the revenue agent in charge of the investigation, objections and statement as counsel by the prosecuting attorney, all lacking in candor, and relating to matters they both knew and were chargeable with knowing.

(c) In the prosecution's tactics to circumvent the presentation of Gersh or his bank records at the second trial: by subpenaing Gersh and releasing him from subpena, without notice to defendant, while defense was putting on its case, by failing to call Gersh in rebuttal as at the first trial, and by objecting to

defense counsel's effort to reopen the case to call Gersh to identify his bank records.

2. Was there prejudicial failure to exercise sound discretion in the interest of justice when the trial judge (a) denied the application of defense counsel to reopen the case in order to provide an opportunity to produce Gersh to identify the vital bank documents, the application having been made prior to the opening to the jury, and promptly after defense learned that Gersh was in fact in town; and (b) thus penalized petitioner because of defense counsel's failure to anticipate the prosecution's tactics described above.

3. Was there prejudicial error in the charge in making the verdict turn on the jury's belief *vel non* in defendant's testimony, and in effect instructing the jury to convict unless they believed in defendant's testimony.

STATUTE INVOLVED

26 U.S.C. sec. 145(b), Internal Revenue Code, sec. 145(b) (as in effect prior to the Internal Revenue Code of 1954) reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to the penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

STATEMENT

1. Background as Referred to by Court Below

As the court below noted (R. 504) the background of the case is developed in its earlier opinion (Appendix B) and may be succinctly stated by quoting an excerpt from that opinion:

> "The appellant was convicted under an indictment charging that he wilfully and knowingly attempted to evade and defeat some $30,000 of the income and victory taxes due and owing by him for the fiscal year ending June 30, 1944, in violation of sec. 145b of the Internal Revenue Code * * *
>
> "The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whisky from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above described were) except for an item of $3,000 profit made on a transaction not involved here.
>
> "Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called "The Cash Box" devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these

remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person.

"Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance o tfhe full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

2. Government's Witnesses at Second Trial

The Government's proof of understated income in this case consisted of testimony that over-ceiling payments for whisky were made direct to Wolcher himself or were made to other persons who passed the money on to Wolcher.

Some 5,000 cases of liquor were involved, which petitioner received from three San Francisco licensed liquor wholesalers. The great bulk of the whisky was sent in six shipments from the East Coast to two of these wholesalers: George Barton Co. and Franciscan Distributing Co. There was also a seventh shipment through Rathjen Bros.

Attention is called to portions of the testimony of the Government's witnesses which indicated that the liquor in question had been obtained by petitioner through over-ceiling payments.

Thus, Samuel Weiss (of Franciscan) testified: In 1943 Wolcher had a few taverns we supplied with liquor. He asked for more whisky, and I told him it was impossible since sources of whisky for distributors were drying up, and that if he wanted more whisky he would have to get it and we would handle the importing as an authorized wholesaler at $2 a case. Wolcher said he could make a few connections in the East through people in the same busi-

ness, and he made arrangements for shipments to our firms from eastern distilleries (R. 122ff, 140-142).

James Oligny testified that in 1943 it was impossible even for wholesalers like his firm, George Barton Co., to get supplies from usual distiller sources. However, Cy Owens made an arrangement for liquor to be shipped to Bartons from the East, and the wholesaler's permitted margin was divided three ways between Barton, Owens and petitioner (R. 100ff).

Owens testified that he owned two taverns together with relatives of petitioner, that whisky was hard to get but petitioner said he had a friend who could get some (R. 75, 85). In the day time whisky was not available except at over-ceiling prices (R. 85-6). Owens received payment from petitioner and transmitted it to George Barton Co. (R. 88). Deliveries were made at ceiling to Owens' bar and were made in part to bars owned by petitioner or his relatives. Owens had nothing to do with any other purchasers (R. 80ff).

Other purchasers, tavern operators, testified they paid over-ceiling prices. Thus Fred Rocci and Pete Cavigla testified they paid $60 a case to one Roy Clemens, the retail ceiling price (slightly in excess of $30) by check and the balance in cash. They had Clemens' pinball machines on location in their taverns. They threatened to switch their machine business from Clemens to a competitor who was offering black market whisky at $60 a case unless Clemens could provide liquor necessary to keep the taverns in operation. (R. 157-166, 210-216.) Clemens testified he went to petitioner from whom he purchased machines and said he needed whisky for survival of his machine business. Petitioner said he would see what he could do. Two months later petitioner said he knew where whisky was available, that Clemens and his customers would have to pay black market prices, and that petitioner wasn't making a dime out of it (R. 291-4). In other cases the arrangements were made with petitioner by Pete Norman

and John Kirby, who had long purchased their machines from petitioner (R. 195ff, 268ff).

About 10 per cent of the whisky involved in this case, 500 cases of Old Brook, was sold by Rathjen Bros. to the "Gold Coast" (a tavern owned by Wolcher) allegedly for $25,950 (Hammerly, R. 46). Xavier Grusenmeyer who testified as to some cases sold for cash over-ceiling, said that petitioner told him this was because he had to pay money over the ceiling price to get the whisky (R. 68). Vance Hammerly, auditor for Rathjen's, testified that the company was so short of liquor that it instituted allotments of whisky among its 5000 customers in accordance with previous purchase volumes (R. 311), that however, that was not done in the case of these 500 cases sold to Gold Coast (R. 315), that this whisky was high-priced, and that these were not handled by Rathjen's general commission salesmen but by a house salesman, Ray Worthy (R. 317).[1]

3. Evidence of Defendant

Defendant Wolcher testified: I did not report the overage I received on sales of whisky on my income tax return because the overages I received were approximately equal to overages which I had to pay (R. 366).[2] (Petitioner reported income of $66,900. The Government contends his income was $102,000. R. 25.)

In 1943 I made efforts to get whisky for the taverns belonging to me and my relatives, that was my original motivating thought, and it spread into helping out customers

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[1] Rathjen's ledger sheets (Deft's. Exh. C and D) show that for months before and after this sale to the Gold Coast in May, 1943, the largest sale by Rathjen for any month to either Gold Coast or Silver Rail Taverns never exceeded $600 in round numbers. In contrast here was a sale for $25,950.

[2] The overages paid out by Wolcher applied to 5000 cases of whisky. Approximately 1500 cases were resold, to taverns owned by Wolcher, his relatives and a few friends, at retail ceiling. The balance was sold to outsiders at overceiling prices (R. 410-411).

and friends (R. 409, 418). Later, when I saw how this was expanding into friends of friends and large volumes, I stopped it (R. 411). In my efforts to get whisky for our bars, I contacted wholesalers, advertised in the papers (Deft. Exh. E), but all without success (R. 385-397). I acquired whisky by paying over-ceiling prices, the same whisky I sold at prices over-ceiling. Clemens, Norman and Kirby were customers of mine in the coin-operated machine business (R. 348). That includes cigarette vending, gun vending, pinball, phonograph, etc., machines and slot machines until their possession became illegal (R. 345).

For the purpose of acquiring whisky from the East, I contacted Williams Gersh, who published a coin machine paper (R. 353-4). I first had a talk with Gersh about whisky in the spring of 1943 (R. 355).[3] As a result I sent Gersh during 1943-1944 close to $150,000. I sent him $5000 in June 1943 for use in making the payment that the whisky cost over and above its regular invoice price (R. 358). As a result the first shipment of whisky arrived from the East through Franciscan Co. (R. 359).

I sent the money to Gersh in various ways: I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360).

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whisky (R. 361).

$5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft's Exh. E, R. 370) and purchased a bank draft which I sent him (R. 363).

$3,300 cash in the middle of August 1943 (R. 359).

$5,000 at the end of August 1943, in cash by mail (R. 461).

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[3] Wolcher was asked what conversation he had with Gersh. The Government's objection was sustained (R. 355-6).

$12,500 by cashier's check dated September 29, 1943 (Deft's Exh. I), which I purchased for cash (R. 378-9).

$60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November, 1943 (R. 360-361); Deft's Exs. F, R. 371-2).

$30,000 cash by express in December or January 1944 (R. 362).

$3,000 which I gave Gersh in New York in 1944 for the purpose of winding up our transactions (R. 367-8).

And there were a number of mailings of $1,000, $12,000, $1,500 apice, mailed to Gersh (R. 404).

In my first arrangement with Gersh I was to pay him $20 a case overage above ceiling. Then he increased it to $25 a case (R. 361-2).[4] The cash I sent Gersh I got from the sale of the whisky (R. 364).

During this period I received money back from Gersh in accordance with our understanding for those instances when I sent him money by check. I entered the original $5000 on my books as a suspense item, Bill Gersh. When he returned the $5000 check we put it in the bank account and cancelled the entry (R. 364). In November 1943 I didn't have enough over-ceiling money to send the required cash and I borrowed $30,000 to pay him by bank draft. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380).

I received back from Gersh approximately $35,000—never by cash. I received a check for $5,000 dated August 13, 1943 (Deft. Exh. G, R. 374); a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375); a check for $2,000 received from his wife (R. 379; Deft. Exh. J, R.

[4] There is no dispute that if petitioner had to pay an overage of $20-$25 a case for whisky, he made no profit on the whisky transactions.

383). And at my suggestion Gersh paid a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased (R. 376-7).

Petitioner testified that he kept no books as such on these transactions and only a brief memorandum record at that time (R. 382). Upon cross-examination it was brought out that except for the checks Wolcher had no record of the money sent to Gersh. Mail was sent not registered (R. 404), money sent express was insured for a nominal sum, was not described as money and no receipt was obtained (R. 403). Petitioner's record at that time was in the form of a simple pocket memo of how much was owing as of the time of any shipment, and he disposed of the earlier memo so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439). The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whisky transaction (R. 405).

As to the purchase from Rathjen Bros., Jack Kent, who then managed Gold Coast cafe, testified (R. 335-7) that when he asked Ray Worthy, salesman for Rathjen's, for additional stock Worthy told him there were 500 cases available of Old Brook, a new bonded whisky, if an additional price were paid under the table; that he put Worthy in touch with petitioner. Kent was led to understand the excess price was $20 a case, but Worthy didn't say that in so many words and Kent didn't negotiate with Worthy (R. 338). Petitioner testified that he made an over-ceiling payment of $10,000 cash to Worthy (R. 349).

4. Tactics and Rulings Frustrating Presentation by Defense of Evidence of Receipt of Cash by Gersh

At the second trial the Government took the following steps to circumvent the presentation of evidence of receipt of cash by Gersh. The Government subpoenaed Gersh as a witness, but rested its case without calling him in rebuttal:

a. Defense counsel (Mr. Friedman) called Richard Appling, the special agent in charge of the investigation of petitioner's tax return, and asked whether he had occasion to procure a copy of Gersh's bank account. Mr. Schnacke, the prosecuting attorney, objected on ground of lack of materiality in the bank account of a stranger (R. 464). The court permitted the question for the time being. Appling answered he did not procure that account during the course of his investigation (R. 465). Mr. Friedman asked Appling to identify the document which was Government's Exhibit 37 at the first trial (later marked Deft's. Exhibit O for identification, R. 472). Appling answered he had never seen it before the first trial, he saw it after the conclusion of the first trial (R. 466). Defense counsel then asked whether photostats of that document were not procured in the course of the investigation under Appling's charge. Mr. Schnacke's objection was sustained (R. 466).

b. Defense counsel then asked Mr. Schnacke to take the stand so that he could ask him about these bank account records. Mr. Schnacke said he would be "tickled" to take the stand but added (R. 467):

> "Mr. Schnacke: I don't have any knowledge of those. I wasn't here at the first trial. I don't know anything about it, about any part of it.
> "Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you." (R. 407)

c. Defense counsel rested and the Government rested forthwith without calling any rebuttal witnesses. The previous trial day (Thursday) the prosecuting attorney informed the court that he had witnesses in rebuttal, who were all noticed for Monday, and the court recessed until Monday (R. 457-8). When the Government rested, the court recessed from 10:30 a.m. to 1 p.m. when counsel were to begin argument to the jury. Mr. Friedman stated that in the interim he had been advised that Gersh was in fact in San Francisco, that if so he would be the best witness

to identify the bank accounts, that these bank documents were of vital interest, and asked that the case be reopened so that defense would have an opportunity to produce him (R. 468-9). Mr. Schnacke stated that Gersh had been subpoenaed by the Government, but that on the previous Friday, August 28, Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." Mr. Schnacke said he had determined this by means of investigation and that Gersh had not been in touch with the Government (R. 468-9).

The court agreed that the matter was material but denied defense counsel's application to reopen the case as not timely, stating that the case had been adjourned at 10:30 a.m. to allow counsel to prepare argument, that the case was now ready to go to argument. (R. 470-3.)

d. Mr. Friedman asked Mr. Schnacke to stipulate that the exhibits were the bank records of Gersh, having been introduced and identified as such by the Government at the last trial (R. 470). Mr. Schnacke stated he did not see any connection with the case, and that defense counsel could have subpoenaed Gersh. Mr. Friedman stated (R. 471) "I didn't think we would have any difficulty in establishing these documents in view of the fact that they are their documents, because the record shows that the Government examined Mr. Gersh." (R. 471) The court repeated that defense application regarding Gersh was not timely (R. 472-3). The Gersh bank statements were marked defendant's Exhibits O and P for identification.[5]

While reserving for later the argument as to the significance of these objections and rulings, it is appropriate

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[5] The record in No. 12992 shows that these were the Corn Exchange Bank ledger sheets of the account of the "Cash Box", a coin machine trade magazine published by Gersh (Record 12992, p. 558) which were brought into the case by the Government, as Government Exhibit 37; the balance was supplied to the defense for introduction as Defense Exhibit C (Record No. 12992, pp. 563, 585). These references to Record No. 12992 are set forth in Appendix C below.

to refer briefly to the significance of the evidence involved.

As is noted in the opinion in *Wolcher* v. *United States*, 200 F.2d 493, Appendix B, Gersh admitted receiving $85,000 from petitioner Wolcher, part by check,[6] and part in cash. Gersh's admission as to the receipt of substantial sums of cash were not only a matter of his oral testimony, but were established by his corroborating bank account records, as appears from the record at the first trial, which is before this Court.[7]

Thus that bank record provides documentary corroboration of the $3,300 cash receipt deposited August 11, 1943; the next $5,000 cash receipt, deposited August 31, 1943; the large receipt of $30,000 cash, deposited January 4,

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[6] Petitioner's payments by check were shown in Defendant's Exhibits E, F and I (R. 370-2, 378-9).

[7] Record No. 12992, U.S. Court of Appeals for the Ninth Circuit, has been duly certified by the Clerk of that Court and lodged with the Clerk of the United States Supreme Court.

That record is properly the subject of judicial notice in this proceeding. *Wells* v. *United States*, 318 U.S. 257, 260; *Alexander* v. *Hillman*, 296 U.S. 222, 231; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 336.

It may be noted that the record in the first trial was referred to by the Government below and by the court of appeals to reject petitioner's claim of error in the ruling (R. 355) excluding his testimony of his conversation with Gersh.

The Government brief below, quoted from the record in the first trial (as to Wolcher's conversation with Gersh) to show that the record at the second trial in fact contained the substance of that conversation, and therefore the ruling excluding testimony as to that conversation (R. 355) was not prejudicial. (Brief, p. 22). The Court of Appeals affirmed, stating that since the substance of the conversation was in fact related by Wolcher there was no prejudice in the ruling (R. 509, Appx. A, p. 6a)

In regard to certain other matters, the Government brief below quoted from the first record (pp. 8-9); (and see footnote 4), and even referred on two points (pp. 6, 31) to Wolcher's brief on appeal from the first conviction. A certified copy of the Government's brief below is on file with the Clerk of the Supreme Court.

1944.[8] Gersh testified as to these, stating that Wolcher usually sent the money in cash, but claimed that he sent it back the way he had received it—by airmail, not registered.[9] The evidence at the first trial further shows that Gersh gave testimony as to these cash receipts from Wolcher to the revenue agents investigating the Wolcher case. In examining Gersh they called upon him to explain his deposits in the Cash Box bank account.[10]

5. The Charge to the Jury

The trial judge charged that the Government's case in essence was that petitioner's contention of sending large amounts in cash through the mail was fabricated and should not be believed (R. 483), that the issue is whether the jury did or did not believe the testimony and the story told by defendant (R. 483). He stressed that the jury could take into account the factors of the illegality of the transactions and the failure to keep books and records (R. 484).

6. Conviction and Recommendation of Leniency

The jury found defendant guilty, but recommended leniency (R. 6). The judge had made no reference to leniency recommendations in his charge and stated only that the matter of punishment is served exclusively for the judge (R. 476). Judgment was for two years' imprisonment and $10,000 fine (R. 19).

7. Appellate Proceedings

The court of appeals affirmed the conviction (R. 511), holding that the refusal of the district court to reopen the trial was within its discretionary authority, and that the

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[8] Record No. 12992, U. S. Court of Appeals for the Ninth Circuit, pp. 586-593, Appendix C, pp. 28a-33a.

[9] Record No. 12992, pp. 601-605, Appendix C, pp. 35a-37a.

[10] Record No. 12992, pp. 629-636, Appendix C, pp. 41a-44a.

charge, taken as a whole, did not err in failing to place on the Government its full burden of proof (R. 504ff).

Upon petition for rehearing, by leave of court, counsel for petitioner filed a separate supplementary statement. A certified copy is on file with the clerk. It was exclusively directed to the contention that the trial tactics of Government counsel constituted misconduct, which point had not previously been presented.

In its order denying rehearing, the court of appeals recited that its order was on consideration of the petition for rehearing and of the supplementary statement in support thereof. No opinion accompanied the order (R. 513).

REASONS FOR GRANTING THE WRIT

1. This is one of the infrequent criminal cases meriting review on certiorari. In terms of the conventional criteria for certiorari, we shall point out that the rulings below are contrary to the opinions of other circuit courts of appeals and in disregard of applicable decisions of this Court. But this petition rests on a broader base, and the entire case should be reviewed. It presents important questions of the administration of justice in criminal cases.

This petition presents several questions which cluster around a single core of injustice—that the prosecution sought and obtained a conviction on the basis that petitioner's testimony as to a critical fact (that he sent large sums of cash to one Gersh) was fabricated out of whole cloth, when the fact that such cash shipments were made was established by the Government's files and the record at the previous trial: petitioner's testimony was corroborated not only by Gersh, the Government's own witness at the earlier trial, but also by Gersh's bank records, documents of the highest integrity.

This Court should grant certiorari not only to review the departures from the accepted and normal course of proceedings detailed below and to correct the serious injustice in this case, but to speak out clearly on the im-

portant question of the Government's duty of fair dealing in criminal cases.

In *Holland* v. *United States*, 348 U.S. 121, decided December 6, 1954, this Court set forth the prosecution's duty to investigate taxpayer's explanations in "net worth" cases. This Court should now set forth the prosecution's underlying responsibility, which applies in all criminal cases, concerning the evidence obtained by the Government which corroborates taxpayer's account in a significant respect. The Government cannot be free to ignore such evidence, to deny knowledge of its existence, or to circumvent its introduction in the record.

Not only to correct the injustice to petitioner, but also to assure that future proceedings are properly conducted, it is important for this Court to enunciate with force and clarity the basic principles governing corroborative evidence. There is need for this Court to provide a beacon pointing to the prosecution's straight path of assisting in the presentation of a full record,—that justice shall be done. In this case the prosecuting attorney turned aside from that path. He not only failed to put before the jury evidence in the Government's possession corroborating the fact that petitioner sent cash to Gersh, he took steps calculated to keep that evidence out of the record. And he nailed down the conviction by the gross misconduct of assailing petitioner's testimony on this vital point (which the jury did not know was corroborated) as a mere fabrication.

Instead of illuminating the case by assisting in presentation of the full record, the prosecuting attorney beclouded and distorted the case. This established the conditions conducive to the trial judge's prejudicial rulings,—the refusal to reopen the case to permit petitioner to present the corroborative bank records, and a charge which induced the jury to convict if they did not believe defendant's apparently uncorroborated testimony.

The prosecution and the courts below sought to uphold their actions and rulings on the ground that defense coun-

sel could have protected his client. In effect they scored defense counsel for failing to anticipate the prosecution's unfair tactics.

For convenience, the questions arising out of the several occurrences at the trial are treated in separate paragraphs of this petition. Each of the prosecution tactics and judicial rulings complained of represents serious error. But attention is particularly called to their formidable cumulative impact on the jury, for they were all knit together into a single result,—that the jury convicted because it did not believe petitioner's (seemingly unsupported) testimony of cash shipments to Gersh.

The jury recommended leniency. There was no instruction that such a recommendation was permissible. The law makes no provision therefor. This leniency recommendation shows forcefully that the jury was uneasy in its verdict, and that the offensive tactics and erroneous rulings were highly prejudicial.

2. Consideration of the issues requires a capsule recapitulation of the basic facts and the posture of the case. Petitioner was convicted of wilfully attempting to evade income taxes. He admittedly received payments above OPA ceilings on certain sales of liquor. Petitioner's defense is that he realized no net income because he had to make equivalent payments above ceiling to purchase the liquor. (Petitioner testified that he was not in the business of selling liquor at wholesale, and that he bought the liquor over-ceiling in order to assure a supply for taverns owned by himself and relatives, and for taverns whose continuance was important to petitioner's customers in the coin machine business.)

Petitioner testified as to large over-ceiling payments made to William P. Gersh, and that these payments had been made partly by check but mostly by cash. He stated his definitive recollection of particular large shipments of cash by mail and express, without registration of mail or any other records or receipts,—of $3,300 in mid-August,

1943; of $5,000 in late August; of $30,000 in December or January, 1944. (See pp. 10-11 above)[11]

The record at the first trial is before this Court.[12] The evidence at the first trial showed that Wolcher had sent large sums of cash to Gersh that way. Government witness Gersh corroborated that Wolcher usually mailed or sent him money by cash in ordinary envelopes, without receipt or registration. These cash transfers were verified by the records of deposits in Gersh's "Cash Box" (trade magazine) account in the Corn Exchange Bank. At the first trial that bank record was brought into the case by the Government as Government Exhibit 37, and the balance was supplied to the defense for introduction, as Defendant's Exhibit G. It provided documentary corroboration of petitioner's account, as indicated by the following:

Petitioner's testimony of cash shipments to Gersh. Record No. 14109. (See pp. 10-11 above).	*Gersh's bank account record of cash deposits, Record No. 12992. (See Appendix C, pp. 27a-29a).*
$ 3,300—mid-August 1943	$ 3,300 deposited Aug. 11, 1943
5,000—late August 1943	5,000 deposited Aug. 31, 1943
30,000—December 1943 or January 1944	30,000 deposited Jan. 4, 1944

Gersh only corroborated petitioner on the fact of large cash transmissions, and on that fact he was compelled by his own bank records. Admitting the receipt of cash was contrary to his own interest, and led him to try to show that such large cash transfers resulted in no income to him. Essentially therefore he was hostile to petitioner. His explanation was that he had received moneys from petitioner in order to obtain phonographs and coin machines which he testified were so scarce that they required full cash payment in advance. In rejoinder, petitioner

[11] He also testified as to two personal deliveries of cash to Gersh of $30,000 and of $3,000, and of a number of mailings of smaller sums, (p. 11 above).

[12] See footnote 7 above.

offered documentary evidence, trade magazines to prove that coin machines were freely offered and easily purchased without the need for advance cash, and correspondence to refute Gersh's assertion that he had arranged phonograph purchases for petitioner. These offers were opposed by Government counsel. The rulings of exclusion were reversed in *Wolcher* v. *United States*, 200 F.2d 493 (see Appendix B, pp. 7a, 15a):

> "We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted."

A. Prosecution's Misconduct

3. At the opening of the second trial the prosecution knew that if the jury were presented with the real issue,—*why* was the cash sent to Gersh—the complete evidence would now include the documentary evidence discrediting Gersh's explanation which had been excluded at the first trial.

And so at the second trial the Government obtained its conviction by presenting the case to the jury not on the real issue but on a spurious one, *whether* cash was sent to Gersh.

As summarized by the judge in the charge (R. 483).

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."[13]

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[13] Prosecuting attorney's exact words to the jury were as follows (p. 25 of reporter's certified transcript on file with the Clerk):

"And then we come to these fantastic shipments of money to the east. We have only Mr. Wolcher's unsupported word for any amounts of cash that were shipped east. And examining those, I think we ought to look at what a business man would do with

The tactic was telling. The jury apparently found it hard to believe that anyone would send large sums through the mail and by express without receipts. It is certainly not common experience. And of course the jury was unaware that petitioner had in fact been corroborated at the first trial by Government witness Gersh and by his bank records.

There is no difference in effect between a conviction obtained by spuriously challenging testimony as fabricated and a conviction obtained on the basis of fabricated testimony. Due process of law is denied when a conviction is obtained upon the basis of perjured testimony. The doctrine was first announced by this Court in *Mooney* v. *Holohan*, 294 U.S. 103, where the prosecutor knew the testimony was perjured. And it applies even though the prosecutor at the trial did not know the evidence was perjured but the fact is later brought to the attention of the Government. *Jones* v. *Kentucky*, 97 F.2d 335 (C.A. 6 Cir.); *Kelly* v. *Ragen*, 129 F. 2d 811, 814 (C.A. 7 Cir.).

But this case does not require a determination as to due process; there has been a complete failure to meet the standard of fair play applicable to federal prosecutors. *Berger* v. *United States*, 295 U.S. 78. In that case this Court denounced as prejudicial and reversible misconduct a prosecutor's action in presenting the case to the jury upon assumptions which he believed to be *true* but which were outside the record. It is far more serious to traduce as a fabrication testimony of the accused which the Government's files and a previous trial record show have been corroborated by documents of the highest integrity, identified by the Government's witness and vouched for by the Government itself at the earlier trial.

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amounts of cash of that sort. If there were any such amounts of cash sent, would they be sent in this fantastic fashion? $30,000, as I recall, bundled up in an express parcel and insured for a nominal amount. Case after case of a thousand, $1,500 stuffed into an envelope and sent by ordinary mail. I don't think that's a very persuasive story."

Even in a civil case "the fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up." *F. W. Woolworth Co.* v. *Wilson*, 74 F.2d 439, 442-3 (C.A. 5 Cir.).

The presentation to the jury in this case was prejudicial misconduct. See *Berger* v. *United States*, pointing out that improper assumptions by the prosecuting attorney carry disproportionate weight against the accused precisely because the jury has special confidence in the prosecuting attorney as an officer of the law pledged to vindication of the innocent as well as punishment of the guilty. See 295 U.S. 78, at 84.

While the prosecuting attorney "may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88. Here he "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense" (295 U.S. at 84). The Government's proper interest "in a criminal prosecution is not that it shall win a case but that justice shall be done." (295 U.S. at 88.)

Petitioner must now turn to this Court to assure that justice shall be done. The presentation to the jury was not separately assigned as error below. Yet with misconduct so gross, this Court should not hesitate to exercise its undoubted corrective jurisdiction, particularly since the injustice of the summation is part and parcel of the injustice wrought by the prosecution's trial tactics and the Court's ruling which forestalled the corroboration of petitioner by the bank records (see paragraphs 4-9).

4. The presentation to the jury was the capstone of earlier machinations meriting rebuke and reversal, tactics discussed in paragraphs 4-6.

(a) When defense counsel sought to identify the Gersh bank account record by questions to Treasury Agent Appling, the prosecuting attorney maneuvered to curtail defense questioning of Appling on the grounds that there was

no materiality in the bank account of a "stranger" to the trial (R. 464-6).

The prosecuting attorney knew better than anyone else just how material these bank records were. For he knew of his plan to attack defendant's apparently unsupported testimony as a fabrication. See Wharton's Criminal Procedure (10th ed.) sec. 1792, p. 2244:

> "Technical objections to competent evidence by prosecuting attorneys, is a 'trick' which has received merited rebuke at the hands of the courts; and compels reversal of judgment by the higher court."

(b) When Mr. Schnacke, the prosecuting attorney, was requested to identify the Gersh bank account records previously brought into the case by the Government, he said he would be "happy" to take the stand, indeed he would be "tickled" to do so, but he continued (R. 467):

> Mr. Schnacke: I don't have any knowledge of those [bank records]. I wasn't here at the first trial. I don't know anything about it, about any part of it.
>
> Mr. Friedman: Well, all right, if you don't know anything about it, I won't call you.

The prosecuting attorney made a statement as counsel which blocked this effort of defense to identify the records. Even in the abstract, how is it possible to credit Mr. Schnacke's assertion that he had prepared a major criminal case for retrial without studying the record of the first trial. How is it possible to take seriously the suggestion that he decided to release the subpena governing Gersh, the Government's critical witness at the first trial, without having carefully studied Gersh's testimony and exhibits at the first trial.

But the point is clinched by the record in this case. For Mr. Schnacke's conduct of the trial clearly reflected his careful study of the earlier record. This is shown by various

instances set forth in the footnote.[14] Attention is particularly called to the way in which Mr. Schnacke cross-examined petitioner on the details of petitioner's endorsement of a $30,000 check to Gersh. Thus Mr. Schnacke asked such questions as these (R. 397-8):

> "Q. Well, actually, you were in the Corn Exchange Bank, weren't you?
>
> • • • • •
>
> "Q. And to accommodate you in cashing the check he signed the name 'Bill Gersh, The Cash Box', under it, didn't he?
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> • • • • •

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[14] a. On the first day of the second trial defense counsel objected to the introduction of a photostat of the petitioner's tax return. He quoted (R. 39) from the Government's offer of the original tax return at the earlier trial, with permission to substitute a photostatic copy, as indicating that the Government had custody of the original. Mr. Schnacke called upon defense counsel to "show us in the record anywhere where that photostatic copy was introduced in substitute for the original return" (R. 40).

b. Mr. Schnacke read into the record (R. 268) as part of the Government's case the testimony of John Kirby at the first trial, Kirby having since died. He read one part of Kirby's earlier testimony (Record No. 12992, pp. 368-374), but eliminated another part (Record No. 12992, pp. 656-668) containing the questions which had been held objectionable on the first appeal. (Appendix B, infra.)

c. On cross-examination of Jack V. Kent, Mr. Schnacke indicated by his question (R. 343-4) that he knew that Old Brook whisky did not sell well in the Gold Coast cafe. That fact was later confirmed by petitioner Wolcher (R. 413-4), but at the time Mr. Schnacke asked the question his knowledge of the fact obviously came from the earlier record. (Record No. 12992, p. 435.)

d. On cross-examination of petitioner Wolcher, in addition to the matter stated in the text of this petition for certiorari, Mr. Schnacke asked (R. 406) (a) whether Wolcher had not run an advertisement in the Cash Box every week during the latter part of 1943; (b) whether Gersh had not paid for equipment received by Wolcher from Runyan Sales Co. These questions had no foundation in the second trial. They were the subject of testimony in the earlier trial. See Record No. 12992, as to (a) p. 760; as to (c) at pp. 533, 594-5.

"Q. Well, you were with him at the time, weren't you?

* * * * *

"Q. And didn't the proceeds received on this check go to you in cash?"

None of these details were indicated at the second trial. *They were all as set forth in the testimony of Gersh at the first trial,*[15]*—on the very page that Gersh's (Cash Box) bank account in the Corn Exchange Bank was identified and brought into the case as an exhibit (Exhibit 37) by the Government (Record No. 12992, p. 562).* The earlier record is before the Court; for convenience the cited references are set forth in Appendix C to the petition.

(c) Appling was the special agent in charge of the Wolcher investigation, lasting many months. He testified that he had no occasion to procure a copy of Gersh's "Cash Box" bank account during his investigation, that he could not identify Government Exhibit 37 at the earlier trial as anything he had seen either before or during the first trial. He was asked whether a photostat thereof was procured by his office in the course of the investigation under his charge. Upon the prosecutor's objection the question was excluded. (R. 464-466)

The right-hand man of the prosecution, Appling attended both trials and was obviously familiar with the entire documentary record. Again the transcript of the first trial clinches the point. Government's Exhibit 39 at the first trial was a statement given by Gersh to the Intelligence Unit on March 16, 1949, under questioning by Appling. And Appling asked Gersh as to the correctness of his answers in his previous statement to the Treasury agent concerning the cash receipts from petitioner and expenditures (R. No. 12992, p. 613, Appendix C, p. 40a).

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[15] Record So. 12992, pp. 560-562; Appendix C, infra, pp. 20a-22a. Wolcher gave contrary testimony, denying receipt of proceeds of the check (Record No. 12992, p. 473).

In the previous (1944) statement (Govt. Exh. 40 at the first trial) the Treasury agent had specifically questioned Gersh on the basis of his deposits as shown by the "Cash Box" account at the Corn Exchange Bank and had been advised that these represented cash funds received by Gersh from Wolcher in cash through the mails. (R. No. 12992, p. 629ff, Appendix C, p. 41aff.)

These tactics require reprimand and reversal. At the very least they reveal a lack of minimum candor required of the Government officials in charge of a prosecution. They are doubly meretricious since they not only resulted in excluding the evidence corroborating petitioner's testimony of cash payments to Gersh, but paved the way for the prosecuting attorney to argue to the jury that this testimony was a fabrication.

5. The transparent and clumsy statements of the prosecuting attorney and the revenue agent serve to point up two things: first, the overreaching in this case; second, the necessity for a clear statement by this Court of the Government's affirmative responsibility to acknowledge the existence of evidence in its files corroborating the taxpayer and to make that evidence available to the court.

In this case the prosecuting attorney professed ignorance of the actions of predecessors and the internal revenue agent in charge of an investigation was shielded from questions concerning the evidence developed during the investigation.

The Government necessarily acts through many agents and officers. But there is only one Government. The top officials at the trial—the attorney in charge, and the revenue agent in charge of the investigation—are chargeable with knowledge of the disclosures made to the Government. Otherwise injustice can be ensured by laziness or wilful blindness of the responsible Government officials. See *United States* v. *Ragen*, 86 F. Supp. 382 (N.D. Ill., 1949), where vital documentary evidence favorable to the accused was given to the police but ignored. The court stated "It

is manifest in this matter that some one identified with the prosecution . . . ignored a material piece of evidence", and held "the prosecution is charged with knowledge of what was contained in the certificate." (86 F. Supp. at p. 387.)

6. The prosecution's tactics in regard to Gersh as a witness were a denial of fair dealing which amounted to a suppression of evidence. In some cases suppression is achieved by more sophisticated tactics than others, but the effect is the same. In the clearest case, the prosecution spirits the witness away to a locked hotel room. It is also suppression if the prosecution knows of some real evidence but fails to make disclosure to the defense. *Griffin* v. *United States,* 183 F. 2d 990 (C.A.D.C.) And even in a case where the identity of the witness is clearly known to the defendant, who dealt with him in the transaction involved, it has been held suppression for the prosecution to fail to advise defendant of the witness' statement corroborating defendant in a material respect. *United States* v. *Rutkin,* 212 F. 2d. 641 (C.A. 3d Cir.)

The doctrine of suppression is more accurately a doctrine of appropriate dislosure and notice. When the prosecution has effective control over witnesses and evidence whose production would normally be anticipated, the course of fair dealing is for the prosecution to notify the defense before releasing or removing the witness. *Sullivan* v. *United States,* 32 F. 2d 992, 994 (C.A. 9 Cir.); *United States* v. *Peterson,* 24 F. Supp. 470 (E.D. Pa.)

In the *Peterson* case Circuit Judge Maris (sitting as a district judge) affirmed a conviction for a counterfeiting violation. But he considered the problem of the prosecuting attorney's obligations. He rejected the contention that the prosecution was required to call eye-witnesses or co-conspirators. But in doing so he pointed out (p. 471):

> " . . . it is now sufficient if the prosecutor notifies the defendant of his determination not to call a particular witness who was present when the crime was committed."

In its brief below (p. 30) the Government sought to distinguish the *Sullivan* case on the ground that there the question was whether the prosecution had erred in revealing to the jury that the co-conspirators were available to the defense if desired as witnesses. But in upholding that action of the prosecutor, even in the presence of the jury, the court dramatically confirmed that such advice by the prosecution to defense counsel is the accepted course of proceeding. The court referred to this procedure as a "simple detail" which was "quite proper" (p. 994).

The prosecution's actions in regard to Gersh did not reflect fair dealing with defense counsel. They comprise an artful campaign to keep Gersh out of the court room. First the prosecution subpenaed Gersh, foreshadowing his appearance in rebuttal as at the first trial. At adjournment time on Thursday afternoon Mr. Schnacke advised the Court that he had rebuttal witnesses (R. 455), and that he had noticed his subpenas for Monday (R. 457). The Court called a recess from Thursday to Monday when the defense would conclude its case and the Government put on rebuttal. The next day, Friday, Mr. Schnacke advised Gersh of his release from the subpena (R. 468). No notice was given to defendant. Defense counsel later sought opportunity to produce Gersh to identify the bank records. With obvious irritation, if not dismay, at the prospect that Gersh might come into the court room, the prosecuting attorney stated that Gersh "was notified that he was not to appear. Nonetheless he appears to be in town." (R. 469)

The Government's brief below (pp. 31-2) sought to support its actions on the ground that the defense could not complain it was hurt by Gersh's absence since it had vigorously attacked Gersh's testimony as false at the first trial. Petitioner denies Gersh's testimony as to why he received the cash. But petitioner never contested Gersh's testimony that he received the cash which stands on an entirely different plane; this was an admission contrary to Gersh's own interest and confirmed by the documentary bank records.

The Government also argued below (Brief, p. 31) that there was no "suppression" because Gersh's evidence had been given at the first trial and was known to petitioner. Is the Government suggesting that it had less responsibility at the second trial than at the first? On the contrary, the first trial is part of the background which sharpens the purpose and technique of the misconduct at the second trial. Fair dealing required the Government to advise the defendant that it was releasing Gersh from subpena and would not call Gersh in rebuttal, as it had done at the first trial. This is particularly true since petitioner was wronged at the first trial by being prevented from presenting to the jury the full (documentary) evidence relating to Gersh's explanation.

The underlying principle of fair play was indicated, in circumstances not too dissimilar, as long ago as *Anderson* v. *George*, 1 Burrows 352 (97 English Reports 349) (King's Bench 1757). The defendant bought goods and paid plaintiff with the note of one Hopley, which defendant endorsed. Plaintiff extended time for payment. When Hopley defaulted, the dispute arose whether plaintiff or defendant should bear the loss of this note. Plaintiff had the note in court but rested his case after proving the sale of the goods, a fact which was not in dispute. Defendant had failed to serve a notice to produce the note and was thus unable to prove it. Plaintiff obtained judgment for the value of the goods sold, but this was reversed on appeal. The court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience.

7. The point has been made that defense counsel could have subpenaed Gersh as a witness. In the first place, the critical need to call Gersh arose because the Government officials professed ignorance of the bank records. Defense counsel pointed out at the trial that he had not anticipated that difficulty (R. 471). Petitioner should not be penalized because defense counsel did not anticipate prosecution's pernicious tactics.

Defense counsel was entirely justified in seeking corroboration of the fact that petitioner sent cash to Gersh from the documentary bank records rather than by calling Gersh as a witness. Gersh was indeed the true witness against petitioner. In the spirit of the Sixth Amendment petitioner was entitled to be confronted by Gersh rather than be put under the necessity of calling him as a hostile witness.

In the second place, and as a separate matter, defense counsel anticipated and was led to anticipate that the prosecution would call Gersh as a rebuttal witness, as at the first trial. It was natural to presume that petitioner would be confronted by the real witness against him. And defense counsel was tricked by the prosecution's action subpenaing Gersh, announcing that it would call rebuttal witnesses (as at the first trial), and releasing Gersh from subpena without notice to petitioner.

Finally, it should be noted that the failure of the defense to subpena or call Gersh could not in any way justify either the prosecution's profession of ignorance concerning the bank records, or its presentation to the jury, as described in paragraphs 3-5.

8. The prosecution, by ignoring Gersh, put on a sham case, a parade of witnesses proving the admitted fact that petitioner received over-ceiling payments. The real issue was why, not whether, petitioner sent cash to Gersh. The question is, do you believe petitioner or Gersh. The case should never have been brought unless the prosecution believed Gersh. Yet the Government kept Gersh out of the court room. Why? Because it was aware how the case would stand if Gersh were called to the stand. Once it was confirmed to the jury that the funds had actually reached Gersh, petitioner could point out the difficulties in Gersh's explanation: That Gersh's contradiction of petitioner was based on his own interest in claiming he had returned funds which otherwise represented income in his hands. That it was not plausible that petitioner would

continue to send funds to Gersh to buy machines, time after time, only to have Gersh promptly return the funds each time saying he could not buy the machines.[16] And most important, petitioner would now be able to introduce the documentary evidence impeaching Gersh's account, which had been erroneously excluded at the first trial.

The Government's failure to call Gersh is mild in comparison to later developments. But in itself it was a maneuver to obtain a conviction by unsound inferences from a partial record, a device to induce the jury to convict because it did not credit petitioner's (seemingly uncorroborated) testimony of cash payments to Gersh. Whether or not the prosecution was required to call Gersh, its failure to do so necessitated scrupulously fair dealing in regard to matters where Gersh would have corroborated petitioner. That is part of the setting for testing the other actions complained of—the prosecution's release of Gersh without notice to defense counsel; its answers frustrating defendant's efforts to identify the corroborating bank records, and the presentation to the jury assailing petitioner's (apparently unsupported) testimony as a fabrication.

B. Judge's Refusal to Reopen Case

9. The Court erred in refusing to reopen the case, to permit defense a reasonable opportunity to call Gersh in order to identify Gersh's bank account record.

The time sequence was as follows: The prosecuting attorney released Gersh on a Friday, during a 3-day recess. On Monday after the conclusion of defendant's testimony, defense counsel was frustrated from identifying the bank records by the actions of the Government officials denying knowledge thereof. Defense counsel perforce rested. The Government rested forthwith. And thus at approximately 10:30 a.m. the taking of evidence was concluded. The

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[16] See Record No. 12992, R. 559-560, 563-4, 575-6, 586-8, 601-8; Appendix C, pp. 19a-20a, 22a-24a, 28a-29a, 35a-39a.

judge recessed until 1 p.m. to begin argument to the jury. Defense counsel opened the afternoon proceedings by stating that he had just learned during the recess that Gersh was in fact in San Francisco, and asked for an opportunity to produce Gersh through a subpena, to identify the bank record, and that the case be reopened for this purpose. The prosecuting attorney stated that Gersh had come to San Francisco the previous evening but not under Government subpena, that Gersh had been told not to come but nonetheless seems to be in town (R. 464-469).

Although defense counsel pointed out that the document was "of vital interest to the defendant's case" (R. 468), the judge denied the application forthwith. In his remarks he stated that he should not be so abrupt, but that the case was at too late a stage, that defense counsel could have subpenaed Gersh. He later said that the evidence was material and that the defense application would have been granted if timely made, but was not now timely (R. 468-473).

The request of defense counsel was presented only two-and-one-half hours after he was surprised by prosecuting attorney's tactics regarding the bank records. This was the first order of business after the brief recess called when the case was submitted. No prejudice to the Government could ensue. In the circumstances, the failure to grant a request of admitted materiality on the ground of lack of timeliness is a harsh and technical ruling which departs from the standard of substantial justice which must infuse criminal proceedings. The accepted judicial practice is to reopen the case where substantial items of evidence is concerned.

What the cases *say* is that reopening a case is a matter for the sound discretion of the court. What the cases *hold* is that sound discretion is to be exercised by reopening the case where the evidence is material and significant. See 23 Corpus Juris Secundum, p. 463, sec. 1055:

> "Where it appears, on application to reopen a case to permit the introduction of further testimony, that

> the proposed testimony is of substantial importance to accused, the application should be granted."[17]

The liberality of the Federal cases in reopening a trial, at least before argument to the jury has begun, is in contrast to a stricter attitude on adjournments sought before trial has begun. There is good reason for the difference in attitude, since the importance of the evidence is sharpened by the very course of the trial.

The Federal cases clearly reflect the accepted judicial course of permitting reopening. We have not found a case where a trial court was reversed for failure to reopen the case. That only proves the point. Certainly there are legions of instances where defendant makes the application. But the cases never appear in the reports because the accepted course is to grant the application when the evidence involved is substantial; the defendant can not appeal the reopening, since the ruling is favorable to him, and the prosecution can not appeal an acquittal.

The appropriate Federal Digest keynote reveals a steady stream of decisions granting the Government's motion for reopening a case prior to argument to the jury; the reopening is held to be an exercise of sound discretion. The cases relied on by the court of appeals are to that effect. See *Brink* v. *United States*, 60 F. 2d 231, 234 (C.A. 6), cert. denied, 287 U.S. 667, where the court reopened the case and allowed the Government to introduce "highly relevant testimony tending to show the condition in which appellant kept his bank accounts"; *Horowitz* v. *United States*, 12 F. 2d 590 (C.A. 5). The other cases include *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), cert.

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[17] See e.g. *People* v. *Oxnam*, 170 Cal. 211, 215, 149 Pac. 165: "While the matter of allowing a party to reopen his case is one committed to the discretion of a trial court, if it had been made to appear to the lower court the proposed testimony was of any substantial importance to defendant, we should say that in the exercise of that discretion an opportunity should have been given to introduce it."

denied, 335 U.S. 830; *Haugen* v. *United States*, 153 F. 2d 850 (C.C.A. 9); *Lutch* v. *United States*, 73 F.2d 840 (C.C.A. 9); *McGrew* v. *United States*, 281 Fed. 809 (C.C.A. 9); *Kalen* v. *United States*, 196 Fed. 888 (C.C.A. 9); *United States* v. *Noelke*, 1 Fed. 426 (C.C.A. 2d).

If the decisions allow liberality on this matter to the Government, with all its vast resources, how much more important in the interest of justice is it to assure liberality to the defense. Certainly the Government could not claim it had released witnesses who would refute the witness sought by petitioner, or any other prejudice.

Only one case in the Federal Digest approves the denial of a defendant's motion to reopen the trial before argument to the jury. That case points out that no showing was made as to the nature of the evidence sought to be added to what had already been received, or as to the witnesses by whom it was expected to be given. *Alexis* v. *United States*, 129 Fed. 60 (C.C.A. 5). It is plain that the accepted course of proceedings is for the trial judge to reopen the trial, at least before argument to the jury has begun, to permit the introduction of substantial evidence of importance to the accused.

In sustaining the trial judge, the court below noted only that petitioner could have subpenaed Gersh (R. 510; Appendix A, p. 7a). It did not consider the explanation that defense counsel had not anticipated the difficulty in identification of the bank records, and the impact of prosecution's tactics of releasing Gersh without notice to defendant. See paragraph 7, above.

The abrupt ruling of the trial judge was not a sound exercise of discretion. Petitioner's liberty is at stake, and the evidence is critical. Sound discretion required the granting of the application, although of course under reasonable safeguards to avoid undue delay. The trial judge permitted impatience to triumph over substantial justice. Opportunity for a full defense is the essence of a fair trial.

C. Charge to the Jury

10. In upholding the charge, the opinion below is in conflict with the decision of another circuit court of appeals and fails to apply an applicable ruling of this court.

The judge charged the jury as follows (R. 483):

> "So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believed his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

The charge riveted the attention of the jury upon the question of whether or not they believed the defendant, and distracted their attention from the basic duty of the Government to prove its case, and to prove it beyond a reasonable doubt.

Both the language quoted and the charge taken as a whole, impelled the jury to convict solely because they did not affirmatively believe petitioner's account of large cash shipments to Gersh. That is error as a matter of law, but an error of particular importance in this case. It put the finishing touch on the prosecution's mischievous campaign in the minds of the jury, which did not know of the corroborating evidence.

The charge was particularly prejudicial since the judge knew that only the previous day he had denied petitioner an opportunity to present corroborating evidence. Notwithstanding the rigor of that ruling, the instruction focussed on the point of cash transfers and the Government's claim that petitioner's testimony was fabricated. The judge referred to the illegality of the transactions involved and the failure to keep records as factors which the jury could take into account, and "which the Court

considers are important factors to take into account" (R. 484.). Even the charge that a jury might disregard all of a witness' testimony if they consider he testified falsely in any material respect (R. 479), which is generally proper, had the impact in this case of inducing conviction if the testimony of cash shipments was found not plausible.

The opinion is in conflict with *Balman* v. *United States*, 94 F. 2d 197 (C.A. 8th Cir.). In that case the trial judge charged:

> " . . . Proof that the defendant was in possession of property recently stolen raises a presumption of guilty knowledge in the absence of an explanation, and it is for you to determine whether the defendant's explanation given by him in this case is sufficient to overcome the presumption; that is, it is for you to determine whether you believe the defendant's explanation of the trunk containing the furs being in his residence."

The court of appeals held that this charge was in error, in effect imposing upon the defendant the duty to establish his innocence and omitting the instruction that acquittal might follow on the Government's case even without an explanation by defendant.

See also *United States* v. *Phillips*, 217 F. 2d 435 (C.A. 7 Cir.), holding that the burden of proof had been shifted to defendant by the judge's failure to charge that the testimony of prosecution's own witnesses might negative proof of wilfulness beyond a reasonable doubt.

The charge obliterated the point, of which the jury should have been made specifically aware, that the Government's own witnesses on the payment of over-ceiling prices to petitioner also testified as to the existence of conditions which indicated that petitioner may not have had income in view of the over-ceiling prices necessary to obtain the whisky. There was testimony that the established wholesalers could not obtain supplies, that there was

no whisky available in the area except at over-ceiling prices. (Petitioner admittedly resold some of the whisky at retail ceilings, which would mean a loss on any whisky bought above ceiling.)

The court of appeals was obviously troubled by the charge but found that it was saved, taken as a whole. It said that the charge that acquittal should follow from a belief in defendant's "story" implied a reference to the defense as a whole, including the testimony of the prosecution's own witness, rather than the defendant's testimony. If anything the term "story" as used in the charge had the effect not only of focussing attention on petitioner's testimony but of doing so in a derogatory fashion, increasing the real burden on defendant. Petitioner was entitled to a clear instruction indicating the possibility of acquittal based on the testimony of prosecution's own witnesses.

The court of appeals also noted that the charge contained various references to the Government's burden to prove guilt beyond a reasonable doubt. But it is elementary that the general portions of the charge are pale to the jury compared to the review of the specific facts and issues.

In *Bihn* v. *United States*, 328 U.S. 633, this Court held that where the case against the defendant was a close one, manifold repetitions of the general principle of presumption of innocence would not outweigh the fact that on the crucial specific passage of the charge, there was substantial possibility that the jury would conclude that the defendant had the burden of explaining possession of stolen ration coupons.

In this case, the specific parts of the charge had essentially this impact upon the jury: (1) The Government says defendant's account of cash shipments is a fabrication. (2) Defendant contends he made no profit. (3) If you believe his story, return a verdict of not guilty; if you do not believe his story, convict him. The surrounding parts of the charge heighten, if anything, the impression generated in the jury that to acquit they had to believe the defendant's testimony.

Each time the petitioner was convicted only because the Government kept from the jury the full evidence relating to Gersh.

At the first trial, however, the Government was aware of its burden to prove an income tax violation. In the second trial the prosecuting attorney secured a conviction in effect by proving admitted ceiling price violations, and by extreme measures diverting from the jury the real facts and issues as to income tax evasion.

The prosecuting attorney saw fit to introduce as a judicial admission the fact that Wolcher pleaded guilty to a criminal information charging ceiling violations on whisky involved in the present case. The court overruled petitioner's contention that the previous criminal proceeding was cumulative as to the admitted fact of receipts over ceiling, yet prejudicial in the mind of the jury (R. 243).

The prosecuting attorney stated in a surface spirit of fair play, that he would anticipate the judge would instruct the jury to disregard the other criminal proceeding except as proof of the fact of over ceiling receipts. Defense attorney said that that would only emphasize the prejudicial evidence (R. 245). The court charged the jury that defendant had already pleaded guilty to price ceiling violations and was not on trial again for the same offense (R. 483-4). The judge stressed that the illegality of the transactions and failure to keep records were important factors in his view.

Lip service is doubtless paid by the Government to the principle that petitioner's admitted violation of OPA ceilings cannot be used to override his innocence of income tax fraud. The actions of the Government officials speak louder than their words.

CONCLUSION

The Government's concern in enforcing the revenue laws and the stern dispensation of justice to wilful violators can not be doubted. But, the Government has a

greater interest in assuring that it is justice that is dispensed, however sternly. As a great Solicitor General has said, "The United States wins its point whenever justice is done its citizens in the courts."

In this case justice was denied: This was due principally to the prosecution's misconduct. The conditions created by that misconduct both induced and were seriously aggravated by the impatience of the trial judge and his charge slanting the burden of proof.

The resulting prejudice to petitioner can not be doubted. The spontaneous jury recommendation of leniency emphasizes how troubled it was even upon the case as it was permitted to develop.

Our democratic society stands in fundamental danger if the prosecution's interest in securing convictions is placed above justice. It is timely for this Court to give renewed and vigorous expression of the principle of fair dealing toward the accused, and to provide a meaningful application of that principle in the matter of evidence in the Government's possession corroborating a taxpayer accused in criminal proceedings. The petition for a writ of certiorari raises important issues of the administration of justice in criminal proceedings and should be granted.

Respectfully submitted,

HAROLD LEVENTHAL
Attorney for Petitioner

Of Counsel:
LEO R. FRIEDMAN

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 77

LOUIS E. WOLCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a-7a) is reported at 218 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals (R. 511) was entered on December 28, 1954, and a petition for rehearing was denied on March 16, 1955 (R. 513). The petition for a writ of certiorari was filed on May 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction was secured by the prosecution through unfair and improper trial tactics.

2. Whether the trial court erred in refusing to reopen the case to permit the defense to subpoena an additional witness.

3. Whether, where petitioner admitted receiving unreported sums on sales of liquor at over-ceiling prices but testified that he paid over-ceiling prices on his purchases and realized no taxable income on the sales, the trial court erred in instructing the jury that they would be justified in returning a verdict of guilty if they were convinced beyond a reasonable doubt that his testimony should not be believed.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On October 4, 1950, a one-count indictment was filed against petitioner in the United States District Court for the Northern District of California, Southern Division, charging him with having willfully attempted to evade and defeat a large part of his individual income tax for the fiscal year ended June 30, 1944. The indictment alleged the following figures (R. 3-4):

Reported Income	*Reported Tax*	*Corrected Income*	*Corrected Tax*
$66,901.02	$41,159.55	$102,385.42	$71,435.61

After a jury trial held in April and May, 1951, petitioner was convicted, but the Court of Appeals reversed for errors committed by the trial court in the admission and exclusion of evidence. *Wolcher* v. *United States,* 200 F. 2d 493 (C.A. 9th). After a second jury trial, lasting approximately five days, petitioner was again convicted. (R. 6.) On September 4, 1953, he was sentenced to imprisonment for two years and fined $10,000. (R. 18-20.) The Court of Appeals affirmed. (Pet. 1a-7a.)

As reflected by his income tax return, petitioner was engaged in several income-producing activities during the prosecution year, the foremost of which

was ownership and operation of the Advance Automatic Sales Company. This concern wholesaled coin-operated amusement devices and vending machines, servicing approximately 1,000 customers over an interstate area. (R. 345-346, 421.) Advance Automatic's customers were location "operators" whose business it was to place equipment purchased from petitioner in various public places, including restaurants, taverns and bars, under a fee or percentage arrangement with the proprietors of those places. (R. 421-422.) In addition to Advance Automatic, petitioner had partnership interests in three taverns and night clubs located in the San Francisco area, and had also financed investments by his relatives in a separate group of bars and taverns also located in San Francisco. (R. 346.)

The Government proved that, during 1943, petitioner had purchased 5,138 cases of liquor for his own account. All of this liquor was purchased from licensed San Francisco wholesale distributors although most of it originated with out-of-state suppliers. (R. 347, 349-352, 410-411.) According to the business records of the distributors with whom he dealt and the testimony of responsible personnel of those concerns, he paid the applicable O.P.A. ceiling price for this whiskey. (R. 46, 56-57, 62, 95-97, 106, 120-122.)

After thus establishing petitioner's whiskey costs, the Government called a series of tavern keepers who testified concerning their purchases of whiskey from two of petitioner's location opera-

tors, Kirby and Clemens. (R. 158-159, 164, 174-175, 179-180, 184-187, 202-206, 223-227, 247-250, 263-266, 347-348, 422.) The purchasers testified to having paid Kirby and Clemens amounts ranging from $20 to more than $30 per case above O.P.A. ceiling prices for this whiskey, the ceiling price portion of the payments by check and the excess, at the operators' requests, in currency. Kirby and Clemens identified the whiskey involved in these sales as petitioner's, corroborated the purchasers' testimony as to the amount and form of payments received, and added that they had personally delivered the entire proceeds of all whiskey sales to petitioner's office. (R. 269-274, 278-288.)

After showing that no income from the transactions previously discussed had been reported on petitioner's tax return (R. 326), the Government rested (R. 333).

Petitioner testified that he had received the 5,138 cases of whiskey; that about 1,500 of them were sold at O.P.A. ceiling prices to bars and taverns in which he or his relatives had a proprietary interest; that the rest (including those sold through Kirby, Clemens and two of his other location operators) was sold at over-ceiling prices; and that the reason he had failed to report any of these transactions on his income tax return was that his profits were approximately offset by some $115,000 (net) which he had paid to one William Gersh, who was instrumental in securing the whiskey (then

a scarce commodity) for him. (R. 348-369, 381, 409-411, 423, 428, 436.)[1]

Petitioner introduced documentary proof that he had sent Gersh $47,500 between June and November, 1943; that Gersh had returned $29,750 to him between August, 1943, and February, 1944; and that Gersh had paid $5,250 of the remainder to the Runyan Sales Company in Newark, New Jersey, on account of some coin-operated phonographs shipped to petitioner. (R. 370-384.) He contended, however, that he had also sent or given Gersh additional funds, approximately $100,000, in currency, and that, of a grand total of about $150,000 paid over, Gersh had reimbursed him only to the extent of the $35,000 provable by documentary evidence, keeping the remaining $115,000. (R. 358-361, 369, 379, 399.)

At the first trial, Gersh, called as a rebuttal witness for the Government, had testified that he had handled money belonging to petitioner in amounts totalling $85,800 between June, 1943, and February, 1944; that $30,000 of this represented a check which petitioner wanted cashed while visiting New York and which he (Gersh) deposited into his account on November 8, 1943, at the request of the bank officials, who refused to advance more than

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[1] Petitioner also testified that with respect to his initial purchase of 500 cases in May, 1943, the over-ceiling premium ($10,000) was paid in cash to one Ray Worthy. (R. 348-350.) It was established at the first trial that Worthy died in 1949. See record of first trial (No. 12992, R. 641-642), *Wolcher* v. *United States*, 200 F. 2d 493 (C.A. 9th).

$10,000 until the check had cleared; that $10,000 was withdrawn by counter-check immediately and the remaining $20,000 four days later, and the proceeds paid over to petitioner; that the remaining $55,800 consisted of amounts advanced to him from time to time in the hope that he could purchase coin-operated machines, a then scarce commodity, for petitioner's Advance Automatic Sales Company; that the only transaction actually consummated was with the Runyan Sales Company to which he paid $5,250 on petitioner's behalf; and that he sent the remaining $50,550 back to petitioner. Gersh's testimony was corroborated by $29,750 in cancelled checks endorsed by petitioner or the Advance Automatic Sales Company and by counter-checks drawn on Gersh's account[2] (corresponding in amounts to those he received from petitioner) for the balance. (No. 12,992, R. 557-639.)

At the first trial the court excluded evidence offered by the defense to show that Gersh's testimony was untruthful, in particular, that contrary to his testimony, coin machines were plentiful and easily purchased during the period in question. On appeal, the Court of Appeals held that such evidence should not have been excluded, since it "would have had weight in determining the question whether Wolcher or Gersh was telling the

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[2] The account was in the name of the "Cash Box", a coin machine trade publication owned by Gersh. (No. 12992, R. 557-558, 562, 581.)

truth with respect to why the money was sent by Wolcher." *Wolcher* v. *United States,* 200 F. 2d 493, 499. The Government did not call Gersh or any other witness in rebuttal at the second trial, thus giving rise to petitioner's principal complaint here.

When the redirect examination of petitioner was completed on Thursday, August 27, 1953, the defense announced (R. 453-455) that with the exception of one Frank Mayer (whose subpoena had been noticed for the following Monday) it had no further witnesses. The prosecutor, Assistant United States Attorney Schnacke, declined to proceed with rebuttal, as suggested by the defense, stating that he would prefer to wait until the defendant had rested, and also that the witnesses had been advised not to appear until Monday, on the strength of the defense's statement that they had a witness appearing that day. The court thereupon continued the case to the following Monday. (R. 454-459.)

After petitioner was asked a few questions on Monday morning, August 31, 1953, the defense, instead of calling Mayer,[3] recalled Special Agent Appling in an effort to have him identify certain bank records of Gersh. Over the Government's objections as to relevance and materiality, Appling testified that he had not procured the records dur-

[3] Mayer was never called, nor was there any stipulation with respect to his testimony. It is clear from his testimony at the first trial, however, that he was quite incapable of identifying Gersh's bank records. (No. 12992, R. 403-407.)

ing his investigation and first saw them after the conclusion of the first trial. A further question as to whether Appling's "office procured photostats of that document" went unanswered, the court sustaining the Government's objections as to hearsay and materiality. (R. 464-466.) Defense counsel then asked the prosecutor informally about the documents and he replied that he had no knowledge of them, whereupon the defense rested. (R. 466-467.) The Government offered no rebuttal, the case was set for argument at 1 p.m. the same day, and the court and counsel discussed proposed instructions to the jury. (R. 467-468.)

At 1 p.m., petitioner asked the court to reopen the case so that he might subpoena Gersh and have him identify the bank records. The Court denied the motion as untimely, pointing out that there had been ample time and opportunity to subpoena Gersh and that no showing had been made as to why the case should be reopened when it was ready to go to argument. (R. 468-473.)

ARGUMENT

1. Petitioner contends (Pet. 17-32) that the Government prosecutor was guilty of "grievous misconduct" and therefore the conviction should be reversed. He argues that the Assistant United States Attorney, Mr. Schnacke, deprived him of a fair trial by presenting the jury with the issue of whether cash was sent to Gersh instead of why it was sent, and that the specific misconduct lay in (a) subpoenaing Gersh and then releasing him

without notice to petitioner and without calling him as a witness; (b) frustrating petitioner's efforts to put Gersh's bank records in evidence; and (c) improperly arguing the case to the jury.

(a) There was no misconduct in failing to call Gersh. At the first trial the defense called six witnesses in addition to petitioner (No. 12992, R. 375-556), and the prosecutor put on eight rebuttal witnesses, the most important of whom was Gersh (No. 12992, R. 556-691). At the second trial, where the defense had only one witness in addition to petitioner, Schnacke (who, incidentally, had not been connected in any manner with the first trial),[4] elected to make no rebuttal. Apparently, Schnacke was of the opinion that the defense was so weak that no rebuttal was required; at all events, the question whether to rest at that point was a matter for his own judgment.

The explanation for the failure of both sides to call Gersh at the second trial appears quite obvious. Had he been called, and had his testimony followed the same lines as that he gave at the first trial, such testimony would in some respects have helped, and in other respects have hurt, each side. True, Gersh testified at the first trial that he had received cash from petitioner. To that extent, but only to that extent, did Gersh corroborate petitioner's story. Gersh's further testimony (a) that he had returned to petitioner substantially all the

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[4] The first trial took place in April and May, 1951, and Schnacke entered on duty June 1, 1953.

money he had received from him and (b) that the money had been sent, not to obtain liquor, but to procure coin machines which were then in short supply, contradicted petitioner's explanation.

It will be recalled that Gersh's credibility had been sharply challenged by the defense at the first trial; and indeed the conviction was set aside by the Court of Appeals because, *inter alia,* the trial court had refused to admit evidence which would have tended to show that Gersh's testimony was untruthful. In these circumstances, it is difficult to find a duty resting on the prosecution to call Gersh as a rebuttal witness at the second trial. The defense also elected not to call Gersh as a witness, doubtless because his testimony, whether truthful or not, would in large measure have contradicted petitioner's. Particularly in view of the extent to which his veracity had been challenged at the first trial, we think that neither side was obliged to call him, and that both the prosecution and the defense had a right to stand on the record as it was made at the second trial. The defense chose to rest on petitioner's testimony, without adding to it Gersh's testimony which in part would have supported and in part would have undermined petitioner's defense. Similarly, the prosecution, believing that petitioner's testimony was in the main false and inherently incredible, chose not to call Gersh or any other rebuttal witness. For each side the question whether or not to call Gersh was one of trial strategy, and we cannot believe that the prosecu-

tion's failure to call Gersh was a "foul blow" of the sort which this Court has properly condemned in many cases.

This is not a case where a Government prosecutor, having knowledge outside the record of material facts not known to the defendant which would tend to establish his innocence, deliberately conceals such facts and prevents them from coming to light. Here, Gersh's testimony at the first trial was as familiar to the defense as it was to the prosecution. His testimony was in no sense "suppressed" by the prosecution. The defense, had it so desired, could have subpoenaed Gersh as its witness, or have requested that he be called as the court's witness. It did neither.

Nor does the record support any inference that the prosecution deliberately misled defense counsel into believing that Gersh would be called as a rebuttal witness for the Government. At no point in the trial did the prosecutor indicate that he would call Gersh as a rebuttal witness; nor did defense counsel ever suggest that he had such an expectation. On the contrary, when the prosecutor announced that the Government had no rebuttal testimony to offer (R. 467), defense counsel expressed neither surprise nor outrage. It is impossible, of course, from this distance to probe what lay in the mind of defense counsel at that juncture of the trial. If he had in fact been taken by surprise by the Government's failure to call Gersh, and if he was then of the opinion that Gersh's testimony was essential if there was to be a full explora-

tion of the issues, surely defense counsel was under a duty to the trial court to convey some intimation to that effect. Instead, as the record shows, the defense permitted the presentation of evidence to be closed, without voicing any objection (*id.*).

Significantly, it was not until 18 months later, in a "supplementary statement" in support of his petition for rehearing in the Court of Appeals, that petitioner for the first time suggested that the prosecution's failure to call Gersh was a "trick" and "grave misconduct." No such allegation was made or even intimated at any time during the trial, or at any later stage of the proceedings in the district court. The contention was not made when the case was appealed to the Court of Appeals, nor even in the petition for rehearing. In these circumstances, it is perhaps not inappropriate to suggest that the point may be a lawyer's afterthought on appeal, the product of a search for error in a cold record. If defense counsel had in fact been taken by surprise at the trial by what he deemed to be a "foul blow" struck by the prosecutor, surely there would have been some manifestation of that fact in the record.

(b) Petitioner contends, along the same lines (Pet. 18-22, 26-27, 30-32), that the Government improperly "suppressed" the bank records concerning Gersh's account in the name of the "Cash Box," his coin machine trade journal, and that those records would have corroborated petitioner's testimony as to cash paid over to Gersh. First of all, as has been noted, *supra*, petitioner showed that he

had transmitted $47,500 in checks to Gersh during the pertinent period, and he also claimed that he had sent some $100,000 in currency, with the net result that Gersh retained for himself some $115,000 after refunding $35,000 to petitioner. On petitioner's own documentary proof, there was thus no question that some financial dealings had taken place between petitioner and Gersh during the year in question. At the first trial, Gersh testified that he had received a grand total of $85,800, that he had returned $35,000 to petitioner,[5] and that the balance was refunded to petitioner in currency, *supra*, pp. 6-7. While it may therefore be assumed, as petitioner contends (Pet. 20), that Gersh's records would have tended to corroborate petitioner's testimony as to three specific transfers of funds to Gersh totalling $38,300, the assumption may equally be made that Gersh's testimony, if it were the same as at the first trial, would have contradicted petitioner's testimony as to the retention of the $115,000. If, therefore, Gersh's records were admitted into evidence without an accompanying explanation by him of their significance, an impression might have been created in the jurors' minds which, from the Government's viewpoint, would have been erroneous and distorted.

At the trial it seems clear that as late as Thursday, August 27, 1953, defense counsel had no intention of introducing these records in evidence, for he

[5] The $35,000 includes the $5,250 which Gersh paid on behalf of petitioner to the Runyan Sales Company for the purchase of phonographs, *supra*, p. 6.

announced (R. 455) that he had only one more witness, Frank Mayer, who obviously would have been unable to authenticate them, *supra,* p. 8, fn. 3. On Friday, the next day, Gersh was notified that he would not be needed as a Government witness (R. 468), and this fact apparently became known to the defense over the week-end. At any rate, on Monday morning, the defense made the abortive attempts already described *supra,* pp. 8-9, to get the records into evidence, without arguing their materiality or importance, without subpoenaing Gersh or a representative of the bank, and without actually offering them. (R. 464-467.)

Petitioner suggests (Pet. 26-27) that Special Agent Appling was untruthful in his testimony as to Gersh's bank ledger sheet for November, 1943, which was Government Exhibit 37 at the first trial. (No. 12922, R. 562-563.) There is nothing in the record to support this charge. Moreover, that particular document (the only one, incidentally, which was put in evidence at the first trial) would have been valueless to the defense. All it would have reflected was the deposit on November 8, 1943, of the $30,000 check bearing Gersh's endorsement, *supra,* pp. 6-7, which petitioner actually produced and introduced into evidence (R. 371-372). It was the Gersh bank records for August, 1943, and January, 1944 (Pet. 19-20), that, in the absence of Gersh's testimony, would have aided petitioner's cause; but neither they nor any of the other Gersh bank records (except for November, 1943, which the Government put in) were introduced by either

side at the first trial.[6] Thus, the records which are now described as of crucial importance to petitioner's case, and the "suppression" of which is argued as ground for reversal (Pet. 28), were not considered sufficiently important by petitioner at his first trial to even be offered in evidence.

Petitioner contends (Pet. 24-26) that Schnacke was untruthful when he stated informally to defense counsel that he had no knowledge of Gersh's bank records; and it is argued here that the prosecutor must have been familiar with the record of the first trial. We may assume that Schnacke had read the record, and that he may even have seen the bank statements before. But it does not follow that he would be competent to authenticate them from the witness stand, which was the purpose for which defense counsel sought to call Schnacke to the stand. Indeed, defense counsel himself was far more competent to authenticate them, for he had represented petitioner at the first trial. In assessing Schnacke's conduct, it should be remembered that defense counsel was attempting to introduce records of a third party who had not testified and who was not present to interpret and explain the meaning of those records, records which could be most misleading to the court and jury in the absence of any explanatory testimony as to the nature of the disbursements shown on the ledger

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[6] The Gersh bank records, other than the ledger sheet for November, 1943, were marked for identification as Defendant's Exhibit G at the first trial but were not offered in evidence. (No. 12992, R. 584-585.)

sheets as charges against Gersh's account. The defense was understandably anxious to get the benefit of Gersh's records without suffering the detriment of his testimony, and the prosecution was understandably anxious to prevent them from doing so. To be sure, Schnacke, in addition to objecting to the specific question as "hearsay as to this witness," suggested that "this whole inquiry is immaterial" (R. 466). Obviously, he could not have meant, and we doubt that the trial judge could have understood, that the transactions between petitioner and Gersh, concerning which the former had previously testified at great length (R. 353-408, 437-438, 443-451, 460-461), were immaterial. In context, the entire tenor of the objection was rather that the inquiry as to Gersh's records was "immaterial" in that Gersh was not present to testify as to their relevancy and significance. Defense counsel did not at the time question either the manner or grounds of Schnacke's objection, and in any event it is difficult to perceive any prejudice to the defense on this score, since the objection was undoubtedly valid and should have been sustained, as it was.

(c) Petitioner argues (Pet. 20-23) that Schnacke was guilty of misconduct in his summation to the jury, in that he professed to disbelieve petitioner's testimony that he sent large amounts of currency to Gersh by ordinary mail, when he must have known that Gersh had so testified at the first trial. The portion of the argument referred to (Pet. 21-22, fn. 13) was not objected to at the trial nor was

it ever brought to the attention of the Court of Appeals. It is true that at the first trial Gersh confirmed such receipts to the extent of the three items totalling $38,300 (Pet. 20) but he also explained how, when and why those sums were returned to petitioner.[7] This was in sharp conflict with petitioner's testimony at both trials that he had turned over more than $100,000 in currency to Gersh, and that Gersh had retained a net amount in cash and checks of some $115,000. As we have pointed out, *supra,* pp. 10-11, the absence of Gersh at the second trial cut both ways. Petitioner lost the advantage of Gersh's confirmation of the receipt of the $38,300, but on the other hand was free of the detriment of his testimony as to (1) the return of the $38,300 to petitioner, (2) the purpose for which petitioner originally transmitted the funds to him, and (3) his flat denials of the receipt of the other large currency transmittals (aggregating about $64,000) testified to by petitioner.

The transcript of the prosecutor's closing argument lodged by petitioner with the Clerk of this Court consumes thirty-four typewritten pages. (Pet. 21, fn. 13.) In one paragraph of that argument, Government counsel remarked that the proposition of cash shipments to the east rested ex-

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[7] For example, as to the largest item, the $30,000 deposited on January 4, 1944 (Pet. 20), Gersh testified (and was corroborated by documentary proof) that $24,750 was returned to petitioner by check and the remaining $5,250 was paid on petitioner's behalf to he Runyan Sales Company for phonographs (No. 12992, R. 580, 592-600, 621-624).

clusively on petitioner's testimony and observed that had such shipments been made in the amounts alleged, it was unlikely that a man of petitioner's business background would have used the methods of transmittal that he claimed. (Pet. 21, fn. 13.)

Now, for the first time, petitioner conceives this argument as prejudical misconduct by Government counsel Schnacke. By making this argument, it is said, Schnacke designedly presented the case to the jury on the "spurious" issue of whether cash was sent to Gersh rather than on the "real" issue of why cash was sent to Gersh. Both of these questions, however, were clearly subordinate to the ultimate issue in the case, namely, whether petitioner had realized a profit from his whiskey dealings that he had wilfully failed to report for the purpose of evading the payment of income tax.

The burden of Schnacke's entire closing argument focused on this dispositive issue. Petitioner had vigorously denied the existence of a taxable profit from this activity and had even insisted that he had no expectation of profit in undertaking it. In substance Schnacke's argument was addressed to the various respects in which these assertions were inherently implausible on the facts developed at the trial. In this vein, Schnacke noted the quantity of whiskey involved, approximately 5,000 cases; the money represented by that whiskey, approximately $300,000; the fact that less than one-sixth of the whiskey was used in petitioner's taverns and those of relatives; the fact that the over-ceil-

ing portions of whiskey sales proceeds were received in currency and kept in petitioner's safes; the fact that petitioner kept only impermanent and incomplete memoranda-type records of his whiskey dealings, his avowed purpose in so doing being to conceal the existence of the transactions; and, finally, that petitioner embarked on this venture realizing that it was illegal and that he was exposing himself to prosecution for black marketeering. These factors, Schnacke insisted to the jury, argued strongly against petitioner's credibility in his persistent denial that he made any profits whatsoever on these extensive black-market transactions. It was within this frame of reference that the remarks now excepted to were made as exemplifying still another frailty of the defense's theory of "confession and avoidance."

Petitioner does not suggest that any part of Schnacke's presentation was inaccurate or improper on the record before the jury and now before this Court. Cf. *Berger* v. *United States*, 295 U.S. 78, 88, where the vice in the prosecutor's argument was his departure from the record. Rather, his contention is that Schnacke's skeptical reference to petitioner's testimony concerning shipments of cash to the east became prejudically improper because of Gersh's testimony at the earlier trial on the same subject. At that trial, Gersh testified that he had received a total of approximately $38,000 in currency from petitioner; $30,000 in a package, presumably by mail or express, in Jan-

uary, 1944, and two batches of $5,000 and $3,300, apparently by mail, in August, 1943. In contrast, petitioner testified at the current trial that he had turned over more than $100,000 in cash to Gersh. He stated that he had sent Gersh $5,000 and $3,300 by ordinary mail in August, 1943; personally delivered $30,000 to him in November, 1943; sent him $30,000 by express in December, 1943, or January, 1944; personally given him $2,700 or $2,800 in the spring of 1944 and sent him numerous envelopes by mail containing from $1,000 to $1,500. Thus it is true that Gersh's testimony at the former trial generally paralleled that later given by petitioner [8] in respect of the mail shipments of $5,000 and $3,300 in August, 1943, and the express shipment of $30,000 in January, 1944.

Petitioner urges that because Schnacke's pretrial preparations undoubtedly included reference to the record of the earlier trial, his closing argument must have been made with full awareness of Gersh's testimony. (Pet. 24.) Assuming that Schnacke was familiar with Gersh's testimony at the first trial, it does not follow that he was bound to accept such testimony as gospel truth in all re-

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[8] At the first trial petitioner related but a single specific instance of his having sent currency to Gersh; that involved an express shipment of $30,000 in a package at an unspecified time. (No. 12992, R. 453, 721.) On the other hand, at the second trial he "definitely recalled" having sent Gersh $3,300 in mid-August, 1943; $5,000 by mail at the end of August, 1943; $30,000 by express in December or January, 1944, and a number of mailings of $1,000, $12,000 [sic], $1,500 apiece [sic]. (Pet. 10-11.)

spects, and that he was barred from making any arguments to the jury which were inconsistent with the testimony Gersh had previously given. Gersh's veracity had been sharply challenged at the first trial, and neither side had seen fit to call him at the second. Had he testified at the second trial, both sides would probably have derived certain disadvantages as well as advantages from his testimony. His absence at the second trial was an eventuality for which both sides were responsible, in the sense that either could have called him had it wished to do so. Since he was not called, his testimony in all its aspects, both favorable and unfavorable to each side, was not before the jury. In these circumstances, we think the prosecutor was entitled to argue the case to the jury on the basis of the record made at the second trial, and that he was not required to present the case as if Gersh's testimony at the first trial, and only so much of it as supported petitioner's story, had been given at the second. We suggest rather that, if he had gone outside the record made at the second trial and had undertaken to argue to the jury on the basis of testimony favorable to the Government which was given at the first trial but not repeated at the second, objection would undoubtedly have been made, and properly, by the defense.

It may be noted, too, that defense counsel, in his closing argument to the jury, did not consider himself bound by Gersh's testimony at the first trial. Gersh had testified, contrary to petitioner's testi-

mony, that the money he received from petitioner was for the purpose of procuring coin machines. Defense counsel argued to the jury, however, as follows:

> No matter what you do with it, no matter how you look at the testimony in this case, there is $12,500 by check, by draft, that went into Mr. Gersh's bank account and has never come back.
>
> What did he get it for? You have only one piece of testimony in this case as to what he got it for. He got it to get whiskey for Mr. Wolcher. And there is nothing else in this record to refute it, and you can't guess at it or surmise it. You can't say "Maybe it was for something else." That's the evidence in this case.[9]

The absence of prejudice is confirmed by the failure of petitioner to raise the issue in the trial court or the Court of Appeals.[10] If the matter approached the importance now contended for it, petitioner should have raised prompt and vigorous objection at the trial, and later should have urged it as ground for a new trial. "The crucial thing is the impact of the thing done wrong on the minds

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[9] Pages 34-35 of the reporter's certified transcript, which has been lodged with the Clerk of this Court.

[10] While the issue of Schnacke's alleged misconduct was raised in a supplement to the petition for rehearing in the Court of Appeals, the portion of the summation now attacked (Pet. 21, fn. 13) was not mentioned.

of other men, not on one's own, in the total setting." *Kotteakos* v. *United States,* 328 U.S. 750, 764. The silence of defense counsel when the incident occurred, and his failure to make any objection until the petition for certiorari was filed in this Court, would indicate that he did not believe that the portion of the summation now objected to was unfair or prejudicial, or had any real impact on the jury; and no one was in a better position to judge than he. Cf. *Friedberg* v. *United States,* 348 U.S. 142, 145-146.

2. Petitioner contends (Pet. 32-35) that the trial court erred in refusing to reopen the case to permit the defense "to call Gersh in order to identify Gersh's bank account record." The contention is without merit. In the first place, the court had already granted a continuance from Thursday to Monday in order to give petitioner an opportunity to question Frank Mayer, who was represented to be the defense's final witness. (R. 453-460.) On Monday came the change in defense tactics previously described, *supra,* pp. 8-9, the defense resting without calling Mayer. In the second place, petitioner is mistaken in asserting (Pet. 33) that the court stated that the evidence was material; the court made no such statement, and petitioner made no attempt to explain the materiality of the evidence.

Petitioner's motion to reopen the case was denied, as the court made clear, for four reasons: (1) It was not timely, having been made at the time set for closing arguments; (2) there was "no showing

made of any reason for it" (R. 469); (3) it was not known how long it would take to secure Gersh's presence in court; and (4) petitioner had had ample opportunity to subpoena him (R. 469-473). Petitioner concedes (Pet. 34) his inability to find a federal case in which a conviction was reversed for denial of a motion to reopen. The disposition of such a motion is a matter within the discretion of the trial court, and clearly there was no abuse of discretion in the circumstances presented here. *Alexis* v. *United States*, 129 Fed. 60 (C.A. 5th). And see *Philadelphia and Trenton Railroad Co.* v. *Stimpson*, 14 Pet. 448, 462-463.

3. Petitioner's final contention (Pet. 36-39) is that the trial court erred in instructing the jury as follows (R. 483):

> So that in my opinion brings the issue of the case down to a very simple, [sic] and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty.

Petitioner argues (Pet. 36) that this portion of the instruction riveted the jury's attention upon the issue of petitioner's credibility and distracted

it from the Government's burden to affirmatively prove its case. We think the instruction was correct on the facts of this case. As noted, *supra*, pp. 5-6, petitioner admitted on the witness stand that he had received the gross income proved by the Government's evidence, and testified that the only reason he failed to report it was that he believed it was approximately offset by the $115,000 he paid Gersh for his services in procuring the whiskey. If the jury believed beyond a reasonable doubt that this "confession and avoidance" was false, they would be justified in finding him guilty. Petitioner himself took out of the case any issue as to whether the Government had proved substantial unreported gross income, and if his explanation as to his reason for failing to report it was disbelieved by the jury, there would be no doubt that the three essential elements of the crime were present: tax liability, an attempt to evade it, and wilfulness. Moreover, the portion of the charge complained of must be read in the context of other parts of the charge adequately defining the Government's burden of proof. (See Pet. 2a-3a.) *Boyd* v. *United States*, 271 U.S. 104, 107.

There is no basis for petitioner's contention (Pet. 37) that the holding of the court below conflicts with *Balman* v. *United States*, 94 F. 2d 197 (C.A. 8th), for the charge complained of here is quite different from that involved in *Balman*, which spoke in terms of presumptive intent and thereby withdrew the issue of wilfulness from the jury's

consideration. See *Morissette* v. *United States*, 342 U.S. 246, 274.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General,

H. BRIAN HOLLAND,
Assistant Attorney General.

PHILIP ELMAN,
Assistant to the Solicitor General.

RICHARD B. BUHRMAN,

GEORGE WILLI,
Attorneys.

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